it, he could be allowed to prosecute his independent right against the bailee in a supplementary hearing. While this is the modern English practice,[5] under the present law elsewhere, whenever it appears that there is even a possibility of liability to both of the claimants the right of interpleader is denied.[6] But it has long since been established that, if the property belongs to another, the bailee may safely deny his bailor's title.[7] The only reason for the requirement of privity, therefore, does not exist. While several of the more recent cases have allowed interpleader though privity was lacking [8] and although disapproval of the requirement of privity has several times been judicially expressed,[9] it is nevertheless unfortunately true that those cases which have expressly considered the question have continued to recognize the rule.[10]

RECENT CASES.

ALIENS — CHINESE EXCLUSION ACT — NATURE OF PROCEEDINGS. — In a proceeding under the Chinese Exclusion Act, the defendant was alleged to be a Chinese person unlawfully within the United States. The only evidence that the defendant was a Chinese person consisted of a confession obtained under such circumstances that it would be inadmissible in a criminal case. *Held*, that the evidence is inadmissible and the defendant must be discharged. *United States* v. *Hung Chang*, 126 Fed. Rep. 400 (Dist. Ct., N. D. Oh.).

It is well established that the trial of a Chinese person under the Chinese Exclusion Act on the issue whether he is unlawfully within the United States is not a criminal proceeding. *In re Chow Goo Pooi*, 25 Fed. Rep. 77; *Fong Yue Ting* v. *United States*, 149 U. S. 698. The principal case, however, differs from these cases in that the issue is whether the defendant is a Chinese person, while in them this fact was admitted. It can hardly be contended that the issue is criminal, since an adverse finding will result in a conviction for an offence admittedly not criminal. Nevertheless since the right of a person to remain in this country depends on the result and that person may in some cases be an American citizen, constitutional rights may be involved. Moreover proceedings under the act against one proven a Chinese person are most drastic and summary. It seems then that it is advisable to use all possible safeguards in determining this preliminary step, and at least to treat the question in the manner of a criminal question, though it is not strictly such. This result was reached in a case similar to the principal case. *Ex parte Sing*, 82 Fed. Rep. 22.

BAILMENT — LIABILITY OF BAILEE FOR ACTS OF SERVANT. — The plaintiff, a coachbuilder, loaned a carriage to the defendant while the latter's trap was being repaired. The coachman in charge of the defendant's carriage-house, without the permission or knowledge of his master, used the carriage on a frolic of his own and damaged it by his negligence. *Held*, that the defendant is not liable. *Saunderson* v. *Collins*, 116 L. T. 365 (Eng., C. A.).

For a comment on the contrary decision by the lower court, see 17 HARV. L. REV. 198.

BANKRUPTCY — JURISDICTION OF STATE COURTS — EXEMPT PROPERTY. — A creditor had attached property in a state court. The debtor was subsequently adjudicated bankrupt, and his trustee sought to have the attachment dissolved. The creditor resisted on the ground that the chattels attached were exempt property. *Held*, that

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[5] *Ex parte* Mersey Docks and Harbor Board, [1899] 1 Q. B. 546.
[6] National Life Insurance Co. *v.* Pingrey, 141 Mass. 411.
[7] Biddle *v.* Bond, 6 B. & S. 225.
[8] Follet Co. *v.* Albany Co., 61 N. Y. App. Div. 296; Packard *v.* Stevens, 58 N. J. Eq. 489.
[9] Crane *v.* McDonald, 118 N. Y. 648; Bartlett *v.* Sultan, 23 Fed. Rep. 257.
[10] Goodrich *v.* Williamson, 10 Okla. 588.

the state court has no jurisdiction to determine the question of exemption. *Thompson* v. *Ragan*, 78 S. W. Rep. 485 (Ky.).

The state courts have jurisdiction to determine controversies arising between the trustee and third persons in relation to the bankrupt's estate. See *Bardes* v. *Hawarden Bank*, 178 U. S. 524. Hence it might be contended that as the question whether the property in suit was exempt was merely collateral to the controversy, the state court might properly have determined the question. The view taken by the court seems preferable, however. The bankruptcy court has exclusive jurisdiction to determine exemptions as between the bankrupt and the trustee. *In re Overstreet*, 2 Am. B. Rep. 486. The purpose of the exemptions is to leave the debtor means for the support of himself and of his family. See *Moran* v. *King*, 111 Fed. Rep. 730. Hence the right to exemptions would appear to be personal to the bankrupt and one which, to be enforced, must be actively asserted by him in accordance with § 7 a (8). *In re Nunn*, 2 Am. B. Rep. 664. Consequently the creditor would seem properly to have been denied the right to set up the bankrupt's claim to exemptions, at least in a state court. It is thought that this question has not previously been adjudicated.

BANKRUPTCY — RIGHTS OF TRUSTEE — ATTACHMENT LIENS. — In October, 1900, some of the creditors of an insolvent debtor attached a part of his property. Shortly after, he conveyed it by a recorded deed to vendees in accordance with a contract made before the attachment. Within four months of the attachment other creditors of the vendor filed a petition in bankruptcy against him under which he was adjudicated a bankrupt. *Held*, that the trustee in bankruptcy, and not the attaching creditors, is entitled to the benefit of the attachment liens. *In re Baird*, 126 Fed. Rep. 845 (Dist. Ct., W. D. Va.).

The trustee in bankruptcy cannot claim the liens of particular creditors upon exempt property. *Lockwood* v. *Exchange Bank*, 190 U. S. 294. It might be argued that by analogy the trustee should be denied the rights of the attaching creditors in the principal case, since he had no rights in the property as against the *bona fide* vendees. See Bankruptcy Act of 1898, § 67 f. It seems also a considerable hardship on the attaching creditors to be deprived of liens which they have not gained at the expense of the other creditors. The court appears justified, however, in disregarding the analogy and the hardship, because of the difference in the provisions of the Act as to exempt property and as to prior attachments. The former is excluded absolutely from its operation. See § 6; § 70 a. Prior attachments, on the contrary, unless ordered "preserved for the benefit of the estate," are dissolved by the adjudication. See § 67 f. Furthermore, the decision promotes the purpose of the Act in effecting a *pro rata* distribution of the debtor's property among all his creditors. The case is of particular interest as the first adjudication of the question under any federal act.

BILLS AND NOTES — CHECKS — TITLE. — The plaintiff gave his check, payable to "J. L. Baldwin," to Baldwin's agent in payment for horses, but in making the sale the agent led the plaintiff to believe that his principal was another person of the same name, a man of high business standing. The bank, having paid Baldwin's indorsee, was sued by the plaintiff. *Held*, that the plaintiff cannot recover. *Sherman* v. *Corn Exchange Bank*, 86 N. Y. Supp. 341.

In determining whether title to a check passes, which was the issue here, it is essential to find an intention of the maker to have it pass. The courts go far in finding this intention. They find it even when the one determined as payee presented himself to the drawer under the assumed name of the owner of the property for the payment of which the check was given. *Land Title and Trust Co.* v. *Northwestern National Bank*, 196 Pa. St. 230; *cf. Robertson* v. *Coleman*, 141 Mass. 231. But in the principal case the one determined to be payee, although the owner of the consideration, was not seen by the plaintiff. If the plaintiff had the wealthy "J. L. Baldwin" distinctly in mind when he wrote the check, the title could not have passed to the other "J. L. Baldwin." *Cundy* v. *Lindsay*, 3 App. Cas. 459: see 14 HARV. L. REV. 60. From the facts, however, it does not appear that the plaintiff had ever heard of either J. L. Baldwin before. It might well be said then that the plaintiff's definite intention was to make the owner of the horses the payee, the name being but a means of indicating that intention. *Cf. Samuel* v. *Cheney*, 135 Mass. 278.

CARRIERS — LIMITATION OF LIABILITY — INJURY TO GRATUITOUS PASSENGER. — A passenger, while riding on a free pass, was killed through the negligence of the railroad company's servants. In accepting the pass, he had agreed that the company should not be liable under any circumstances for his injury. *Held*, that the deceased's agreement is valid and a bar to an action by his representative for his wrongful death. *Northern Pacific Ry. Co.* v. *Adams*, 24 Sup. Ct. Rep. 408.

As to whether a common carrier can by contract limit its liability for negligence toward a gratuitous passenger the cases are in some conflict. *Kinney* v. *Central R. R. Co.*, 34 N. J. Law 513; *Gulf, etc., Ry. Co.* v. *McGown*, 65 Tex. 640. The view of the Supreme Court in passing on the point for the first time in the principal case seems the better one on authority, but is open to some objection. It is hard to distinguish such contracts from similar contracts with passengers paying consideration lower than the ordinary rate, which are generally held void as against public policy. *Railroad Company* v. *Lockwood*, 17 Wall. (U. S.) 357. The interest of the state in providing for the safety of its citizens in spite of themselves is as great in the one case as in the other. The two kinds of passengers have equal freedom of choice between paying full fare with protection in case of injury, and accepting a lesser liability with a lower fare. And the contention that in carrying gratuitously the carrier is not acting as, and hence is not subject to the burdens of, a public service company, is contrary to fact and to the decision of the Supreme Court. *Philadelphia, etc., R. R. Co.* v. *Derby*, 14 How. (U. S.) 468. As to whether such an agreement of the deceased, even if valid, is a bar to suit by his representative for his death, see 13 HARV. L. REV. 309; 14 *idem* 290.

CONFLICT OF LAWS — ENFORCEMENT OF FOREIGN CONTRACTS — PUBLIC POLICY OF FORUM. — The defendant, under duress of the plaintiff's threats to prosecute the defendant's husband for embezzlement in France, contracted in France to repay the embezzled money in consideration of forbearance to prosecute. The contract was valid and enforceable by French law. *Held*, that the English courts will not enforce it. *Kaufman* v. *Gerson*, 20 T. L. R. 277 (Eng., C. A.).

The court rested its refusal to enforce a contract obtained by duress on the ground that it belonged to the class of contracts "which in their nature are founded on moral turpitude." See STORY CONF. LAW, 7th ed., § 258. The phrase is an elastic one, expanding and contracting according to the ideas of the judges. Thus, in 1810, the Massachusetts court was ready to enforce a note given for slaves imported to South Carolina. *Greenwood* v. *Curtis*, 6 Mass. 358. The result would probably have been different in 1859, when the diversity between the law of the forum and the proper law would have depended on "an opposition of deep-seated moral ideas." See WESTL. CONFL. § 196. English and French ideas are hardly so opposed as to the moral turpitude of duress by threat. English contracts thereby obtained are good at law though voidable in equity or subject to an equitable defense. *McClatchie* v. *Haslam*, 63 L. T. (N. S.) 376. The present decision indicates that the English courts are ready to go as far as a recent North Carolina case refusing to enforce a contract good even in equity by the proper law of the contract, but unconscionable by the law of the forum. *Rowland* v. *Old Dominion Ass'n*, 115 N. C. 825.

CONSTITUTIONAL LAW — CLASS LEGISLATION — LEVY FOR COUNTY PURPOSES. — *Held*, that a statute authorizing commissioners to levy taxes for county purposes in a named county at a rate not to exceed a specified maximum contravenes the provision of the Ohio constitution that all laws of a general nature shall have a uniform operation throughout the state. *Pump* v. *Lucas County Com'rs*, 69 N. E. Rep. 666 (Oh.).

The decision goes upon the ground that any legislation setting a limit to the power of taxation is general in its nature. On the abstract proposition it is difficult to take issue with the court, although the result reached seems undesirable. It appears to be quite in line with other decisions of the same tribunal; for while the Supreme Court of Ohio recognizes the right of the legislature to create taxing districts and to levy special assessments on those who are specially benefited, it has condemned a statute which provided for the refunding of taxes paid upon exempt property and which was applicable to one county only. *Com'rs* v. *Rosche Bros.*, 50 Oh. St. 103; see *Hill* v. *Higdon*, 5 Oh. St. 243, 246. An enactment authorizing the building of highway bridges in a single county, and a statute appointing boards of equalization with greater powers in a specified county than in others were likewise held unconstitutional. *State* v. *Davis*, 55 Oh. St. 15; *Gaylord* v. *Hubbard*, 56 Oh. St. 25. Other jurisdictions with similar constitutional provisions have interpreted them so as to reach the opposite result. *Midland Elevator Co.* v. *Stewart*, 50 Kan. 378.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — TAXING PERSON NOT OWNER. — A state statute required proprietors of bonded warehouses to pay the taxes on liquors stored therein and gave them a lien on the liquors for the amount paid. *Held*, that the statute does not take property without due process of law. *Carstairs* v. *Cochran*, 24 Sup. Ct. Rep. 318.

A state statute imposed a privilege tax upon persons conducting the business of advertising in street cars, and made the street-car company which leased or sold the

privilege liable for the payment of the tax. *Held*, that the statute is unconstitutional, since it takes property without due process of law. *Knoxville Traction Co.* v. *McMillan*, 77 S. W. Rep. 665 (Tenn.). See NOTES, p. 484.

CONSTITUTIONAL LAW — ELEVENTH AMENDMENT. — A private individual, holding bonds of the state of North Carolina, donated them to the state of South Dakota, and the latter brought suit on them. *Held*, that the Supreme Court of the United States has jurisdiction. *State of South Dakota* v. *State of North Carolina*, 24 Sup. Ct. Rep. 269. See NOTES, p. 483.

CONSTITUTIONAL LAW — EMINENT DOMAIN — IRRIGATION DITCHES FOR PRIVATE USE. — The plaintiff, in order to obtain water for agricultural uses on his own farm, brought suit to condemn a right of way in a ditch running across the defendant's land, under a statute providing for the exercise of eminent domain in favor of persons desiring water for irrigation purposes. *Held*, that the way may be condemned. *Nash* v. *Clark*, 75 Pac. Rep. 371 (Utah).

It is universally held that private property can be taken under power of eminent domain only when the taking is for a public use. As to what uses are public the decisions differ. Some courts restrict the term to cases where the property taken is actually used by the public, or is under its control. *Varner* v. *Martin*, 21 W. Va. 534. By a broader view, however, a use is public when it results in a material advantage to the whole, or a considerable portion of the community. *Olmstead* v. *Camp*, 33 Conn. 532. This is the usual ground on which eminent domain proceedings in favor of milling and mining interests are supported. *Great Falls Manufacturing Co.* v. *Fernald*, 47 N. H. 444; *Dayton, etc., Co.* v. *Seawell*, 11 Nev. 394. The condemnation of the way in the principal case can be considered a taking for a public use, only because the public gets an indirect and doubtful advantage from the superior cultivation of the plaintiff's land. Such reasoning, however, has been expressly repudiated. *Scudder* v. *Trenton Falls Co.*, 1 N. J. Eq. 694. The result of the principal case, though extremely desirable in the arid sections of this country, would usually be thought to require a constitutional amendment.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — EXCLUSION OF ALIENS AS A JUDICIAL QUESTION. — The petitioners, Chinese persons, applied for admission to the United States, but were refused admission and detained by the immigration officers on the ground that they were not citizens of the United States and not within the classes entitled to admission. The petitioners refused to answer the questions asked by the officers or to appeal to the Secretary of Commerce and Labor, as allowed by the statute, but instead applied for discharge from custody on *habeas corpus*, alleging that they were citizens of the United States. *Held*, that the writ must be dismissed and the petitioners remanded. *In re Sing Tuck*, 126 Fed. Rep. 386 (Circ. Ct., N. D. N. Y.). See NOTES, p. 488.

CONSTITUTIONAL LAW — TAKING OF PROPERTY — RIPARIAN RIGHTS. — For the purpose of preventing further erosion at a point on the bank of the Mississippi River, the United States erected a revetment. As a result, the current was continued in its previous course and the land of the plaintiff on the opposite bank was gradually eroded. *Held*, that there is no taking of property for which compensation should be made. *Bedford* v. *United States*, 24 Sup. Ct. Rep. 238.

By the better rule, improvements in navigable streams which would constitute cause for action if made by private riparian owners are a taking of property when made by the state, and require compensation. *Thompson* v. *Androscoggin, etc., Co.*, 58 N. H. 108. Thus, there is a taking of property if lands are overflowed. *Pumpelly* v. *Green, etc., Co.*, 13 Wall. (U. S.) 166. The same is true when lands are damaged by the percolation of water through embankments which raise the level of the stream. *United States* v. *Lynah*, 188 U. S. 445. Since the protection of his bank is the right of the riparian owner, embankments erected for that purpose which deepen the channel and erode the opposite bank are not cause for action. *Barnes* v. *Marshall*, 68 Cal. 569; *Henry* v. *Vermont Central R. R.*, 30 Vt. 638. Similarly, the erosion resulting from the deepening of the present channel by embankments raised by the state is not a taking of property for which compensation must be made. *Alexander* v. *Milwaukee*, 16 Wis. 247; *Green* v. *Swift*, 47 Cal. 536. The present decision accords with the weight of authority and seems thoroughly sound in principle.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — DISRESPECT OF COURT'S DECREE AGAINST ANOTHER. — An injunction was issued restraining certain persons, their agents, and all persons connected with them, from doing certain acts.

The defendant was not a party to the injunction proceedings nor was he served with the injunction. He was associated with the persons enjoined, however, and a member of the same labor union. He did the acts enjoined with knowledge of the injunction. *Held*, that the defendant is guilty of contempt of court. *People, ex rel. Stearns* v. *Marr*, 88 N. Y. App. Div. 422. See NOTES, p. 486.

CORPORATIONS — POWER TO ENTER INTO PARTNERSHIP — TRAFFIC AGREEMENT BETWEEN RAILROAD COMPANIES. — Two railroads were operated as parts of one system, the profits of all joint business being divided according to mileage. A passenger holding a ticket from a point on one road to a point on the other was killed on the line of the first company through the negligence of that company. His representative brought action against the second company. *Held*, that the agreement for division of profits is not *ultra vires* and that the second company is liable. *Lehigh Valley R. R. Co.* v. *Dupont*, 30 N. Y. L. J. 1925 (C. C. A., Second Circ.). See NOTES, p. 481.

DEEDS — EXCEPTIONS AND RESERVATIONS — TENANCY IN COMMON. — The grantor of a tract of land reserved to himself, his heirs, and assigns, the use and occupancy of any one of the coal banks on the land that he or his successors might at any time select. His successor sought in ejectment to establish his title to one of the banks of coal that were developed on the land. *Held*, that the plaintiff has no title to any of the coal. *Chapman* v. *Mill, etc., Co.*, 46 S. E. Rep. 262 (W. Va.).

This case repudiates the doctrine sometimes advanced that such an exception is not void, but makes the parties tenants in common, subject to a choice in partition according to the terms of the deed, as if one tenant in common gave the other by deed the power of partition. See *Smith* v. *Furbish*, 68 N. H. 123. Obviously any question as to partition is irrelevant unless the tenancy itself is possible. The fundamental requisite of tenancy in common is that the interest of each tenant be definable as a certain fractional part of the whole. See *Canning* v. *Pinkham*, 1 N. H. 353, 355; *Brownfield* v. *Johnson*, 128 Pa. St. 254, 267. Consequently, an exception of land for a street between termini not located is void. *Savill Brothers, Limited* v. *Bethell*, [1902] 2 Ch. 523. As the exception in the principal case was not of a fraction of all the coal, nor of one of many veins substantially alike, but of one of an unknown number of veins inevitably widely different in area, depth, and value, it is difficult to imply from the deed a tenancy in common. Consequently the reservation is void for indefiniteness.

FEDERAL COURTS — JURISDICTION — REMOVAL OF ACTIONS. — The plaintiff sued a foreign corporation in tort for negligence and joined two of its servants, citizens of his own state, as defendants. In consequence of the application of the doctrine of *res ipsa loquitur* to the corporation but not to its servants, the facts averred were sufficient to make out a case against the corporation only. The latter removed the cause from the state court to the federal circuit court. *Held*, that the federal court has jurisdiction. *Bryce* v. *Southern Ry. Co.*, 125 Fed. Rep. 958 (Circ. Ct., S. C.).

In order to give the federal court jurisdiction of a cause on grounds of diversity of citizenship, the state citizenship of all the parties plaintiff must ordinarily differ from that of all the parties defendant. If the cause of action is joint it is immaterial that the plaintiff's motive in joining a certain defendant was to prevent the federal court from acquiring jurisdiction, even although the defendants might have been sued separately, and might have separate defenses. *Chesapeake, etc., Ry. Co.* v. *Dixon*, 179 U. S. 131. The principal case illustrates an important limitation upon that rule, namely, that the jurisdiction of the federal court can be thus ousted only when the complaint discloses a sufficient cause of action against the nominal defendant joined. The authorities are not in entire agreement upon the precise question thus raised, but the decision of the court would seem to be entirely within the application of the recognized doctrine that if a complaint against joint defendants presents a separable controversy, either defendant otherwise entitled may have the suit as to him removed to the federal court. *Fergason* v. *Chicago, etc., Ry. Co.*, 63 Fed. Rep. 177; *Warax* v. *Cincinnati, etc., Ry. Co.*, 72 Fed. Rep. 637.

HIGHWAYS — ABUTTER'S RIGHT TO SHADE TREES. — The plaintiff sued the defendant for negligently destroying shade trees situated on a highway in front of the plaintiff's premises. The plaintiff owned no part of the highway and had not planted the trees. *Held*, that the plaintiff may recover. *Donahue* v. *Keystone Gas Co.*, 85 N. Y. Supp. 478.

This extends a previous New York case in which the plaintiff had planted the trees with the sanction of the municipal authorities. *Lane* v. *Lamke*, 53 N. Y. App. Div. 395. This, in turn, was an extension of the previously recognized rights of an abutter, the so-called easements of access, light, and air. *Lahr* v. *Metropolitan Elev.*

Ry. Co., 104 N. Y. 268. To provide these three to the abutter is part of the purpose of a highway. But shade trees would seem to be merely accidental embellishments, not within the principle. Nor has the plaintiff suffered the special damage necessary to an action arising from the violation of a public right which belongs to him only as a member of the municipality. For that damage must be of the kind recognized in other torts and suffered peculiarly by the plaintiff above the rest of the public as a result of the violation of some legal right besides the public right. See *Metzger* v. *Hochrein*, 107 Wis. 267. A familiar example is personal injury from obstructions in a highway. The destruction of property on adjoining land is not a recognized tort. It follows that the abutter is not injured by the destruction of shade trees unless he owns the soil. *Western Union Tel. Co.* v. *Krueger*, 64 N. E. Rep. 635 (Ind.).

HIGHWAYS — EXTENT OF PUBLIC EASEMENT — INTER-URBAN STREET RAILWAYS. — An inter-urban street railway passed over the city street on which the plaintiff's land abutted and in which he owned the fee. *Held*, that the running of inter-urban cars is an additional servitude on the plaintiff's land. *Younkin* v. *Milwaukee, etc., Co.*, 98 N. W. Rep. 215 (Wis.).

For a discussion of the principles involved see 17 HARV. L. REV. 66.

INJUNCTIONS — PREVENTION OF FRAUDULENT DEALING IN NON-TRANSFERABLE TICKETS. — *Held*, that railroads issuing and intending to issue non-transferable tickets for the round trip to the Louisiana Purchase Exposition are entitled to an injunction restraining ticket brokers from buying, selling, or dealing in the return coupons of such tickets. *Schubach* v. *McDonald*, 78 S. W. Rep. 1020 (Mo., Sup. Ct.).

The decision is contrary to the recent decision by the Supreme Court of New York in the case of *New York Central, etc., R. R. Co.* v. *Reeves*, 85 N. Y. Supp. 28, which was adversely commented upon in 17 HARV. L. REV. 202. The decision in the principal case appears to go even further in granting relief than was there requested, since the injunction here included tickets to be issued as well as those already issued.

INTERPLEADER — NECESSITY OF PRIVITY. — Commission merchants sold cattle for the ostensible owners. The fund realized was claimed by the latter and also by certain other parties claiming to have been the owners of the cattle by paramount title, as mortgagees. The commission merchants brought a bill of interpleader. *Held*, that the bill will lie. *Byers* v. *Samson-Thayer Commission Co.*, 19 Chic. L. J. 753 (Ill., App. Ct.). See NOTES, p. 489.

LEGACIES AND DEVISES — FORFEITURE ON CONDITION — HAPPENING OF CONDITION IN TESTATOR'S LIFETIME. — A will declared that certain benefits given to the testator's daughters should be forfeited if they married within a certain degree of kindred. Between the date of the will and the testator's death, a daughter married within that degree. *Held*, that the provision as to forfeiture applies only to marriages after the testator's death. *In re Chapman*, 116 L. T. 387 (Eng., C. A.).

In the endeavor to give effect to the testator's real intention, a different result has been reached in analogous cases. Thus on a bequest to A "until her marriage," or "so long as she continue single," marriage in the testator's lifetime works a forfeiture. *Bullock* v. *Bennett*, 7 De G. M. & G. 283; *West* v. *Kerr*, 6 Ir. Jur. 141. Similarly, on a devise to X until "he shall come into possession of the family property," if X comes into possession before the testator's death, there is a forfeiture. *Wynne* v. *Wynne*, 2 Keen 778. And on a devise to X until he become a bankrupt, an undischarged bankruptcy existing at the testator's death causes a forfeiture. *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1. In support of the principal case, it may be urged that the language of the will, speaking from the time of the testator's death, is prospective, and thus refers to conditions subsequent which have become impossible, and therefore cannot act to divest the estate. *Merriam* v. *Wolcott*, 61 How. Pr. (N. Y.) 377; *Peyton* v. *Bury*, 2 P. Wms. 626. On the whole the rule declaring the gift forfeited seems more in accord with the testator's intention, and that rule is supported by the weight of authority. *Phillips* v. *Ferguson*, 85 Va. 509.

LIENS — MONEY ADVANCED BY CARRIER FOR CUSTOMS DUTIES. — The plaintiff shipped goods in bond from Japan to St. Louis. The Canadian Pacific Railroad for its own convenience entered the goods without authority at St. Paul and paid the customs duties. The defendant, the terminal railroad, advanced such duties to the prior carriers, and claimed a lien on the goods for the advances. *Held*, that the lien exists under the federal statutes. *Wabash R. R. Co.* v. *Pearce*, 24 Sup. Ct. Rep. 231.

The statutes in question are the general provisions authorizing the inspection of

imports, the importation of goods under bond, and the assessment of duties. The lien here claimed is nowhere expressly mentioned. The Missouri court accordingly considered that no such lien existed. *State ex rel. Wabash R. R. Co.* v. *Bland*, 168 Mo. 1. The principal case however argues that since by general custom a carrier advances similar charges, such as freight due to prior carriers, and by common law is given a lien for such advances, these statutes impliedly grant a lien for import duties advanced. This view goes to the limit of judicial construction. In the absence of statute, the existence of the lien at common law is doubtful. On the one hand the import duty is a necessary expense of carriage naturally advanced by railroads to prevent delay. *Cf. Guesnard* v. *Louisville, etc., Ry. Co.*, 76 Ala. 453. On the other hand, the necessity of paying duties in St. Paul arose from the wrongful act of the prior carrier. *Cf. Pearce* v. *Wabash R. R. Co.*, 89 Mo. App. 437. The decision in the principal case secures a uniformity highly desirable.

MALICIOUS PROSECUTION — TERMINATION OF PREVIOUS PROCEEDINGS — SUFFICIENCY OF DISCHARGE FROM ARREST BY MAYOR. — A city charter gave the mayor discretion to discharge the defendants in actions for the violation of city ordinances. *Held*, that in an action for malicious prosecution by a person arrested on the defendant's complaint, such a discharge by the mayor is not a favorable termination of the criminal proceedings sufficient to sustain the action. *Tyler* v. *Smith*, 56 Atl. Rep. 683 (R. I.).

In an action for malicious prosecution a termination of the prosecution favorable to the plaintiff must be shown. The theory seems to be that it is against public policy, which encourages the apprehension of wrongdoers, that persons should be deterred from preferring charges through fear of exposure to groundless actions for malicious prosecution. What is a termination sufficient to sustain the action seems not to be settled by any rule of law. Certainly an acquittal on the merits is not essential. Thus it is enough to show a discharge on the entering of a *nolle prosequi*. *Douglas* v. *Allen*, 56 Oh. St. 156. In the principal case the prosecution was legally and finally terminated and there seems to be nothing in such a termination inconsistent with the right to maintain this action. Furthermore the consequence of this decision is that a discharge by the mayor is necessarily fatal to an action for malicious prosecution. The injury of which the plaintiff complains is, however, complete, and his remedy against the defendant therefor should not be thus defeated.

MANDAMUS — PHOTOGRAPHS OF CRIMINALS — SURRENDER AFTER ACQUITTAL IN NEW TRIAL. — A prisoner, after conviction for murder and during his confinement, was photographed and measured according to the Bertillon system for the identification of criminals. After a reversal of the judgment of conviction and his acquittal on a new trial, he applied for a writ of mandamus commanding the Superintendent of Prisons to remove the photographs and measurements from the records of his office. *Held*, that the writ will be denied. *In re Molineux*, 177 N. Y. 395.

For a discussion of the principles involved, see 17 HARV. L. REV. 142.

MASTER AND SERVANT — DUTY OF MASTER TO PROVIDE SAFE APPLIANCES — DOMESTIC SERVANTS. — The defendant engaged the plaintiff as a domestic servant, promising to provide board and lodgings. Owing to a leak in the roof, the plaintiff's bedroom became unfit for use. The plaintiff, relying on the defendant's promise to repair, remained, and became sick. *Held*, that the plaintiff may recover. *Collins* v. *Harrison*, 56 Atl. Rep. 678 (R. I.).

It is a well settled doctrine that a master must supply his servant with reasonably safe appliances, including premises. *Noyes* v. *Smith*, 28 Vt. 59; *Ryan* v. *Fowler*, 24 N. Y. 410. Nor does a servant, by remaining a reasonable time, assume the risk of known defects which the master has promised to repair. *Fitzgerald* v. *Connecticut River Paper Co.*, 155 Mass. 155. It is on this ground that the present decision must rest, since the action was not on the contract but in tort. It has been urged, however, that the rule was designed for the protection of factory employees working on relatively dangerous premises with machinery and materials of which they can have but little knowledge, and should not be extended to household servants who use only familiar implements. *Marsh* v. *Chickering*, 101 N. Y. 396; *Corcoran* v. *Milwaukee Gas Light Co.*, 81 Wis. 191. On theory this seems unsound, for while improbability of danger would undoubtedly decrease the care required of the master, it should not excuse from the duty to exercise care; and though familiarity with the tools increases the likelihood of a servant's assuming the risk, it does not follow that the servant always assumes it. Upon this reasoning the present decision seems theoretically sound, and is not greatly in advance of the weight of authority. *Mahoney* v. *Dove*, 155 Mass. 513.

MORTGAGES — EQUITABLE MORTGAGE — PRIORITY DETERMINED BY NOTICE. — A son created incumbrances upon such estate or interest as he should become entitled to at the death of his father. Soon after his father's death he became insolvent, and the various incumbrancers notified the administrator of their claims on his legacy. The question arose between these incumbrancers whether their priorities in this fund were to be determined by the date of their respective incumbrances or by priority of notice to the administrator. *Held*, that priority of notice governs. *In re Dallas*, 48 Sol. J. & R. 260 (Eng., C. A.).

The rule of the English courts that an assignee of an equitable interest in personalty who fails to give notice to the trustees is postponed to a subsequent assignee who in the exercise of due care has given such notice, has generally been applied to cases where the first assignee's failure to give notice has been the means of allowing the assignor fraudulently to create a subsequent incumbrance. *Dearle* v. *Hall*, 3 Russ. 48; *Lloyd's Bank* v. *Pearson*, [1901] 1 Ch. 865. Though possibly a strong factor in its introduction, the negligence of the first assignee cannot be regarded as the basis of the rule. Later decisions admit the difficulty of explaining the doctrine on any satisfactory principle, but accept it as a positive rule of law. *Ward* v. *Duncombe*, [1893] A. C. 369; *In re Wasdale*, [1899] 1 Ch. 163. In the principal case the failure of the first assignee to give notice was due to the fact that until letters of administration were granted there was no one to notify. It has been said that where notice is impossible the first incumbrancer is not prejudiced by failure to give notice. See *Feltham* v. *Clark*, 1 De G. & Sm. 307. Nevertheless, in view of decisions applying the rule to cases where the first assignee was in no way negligent, the court would seem justified in expressly repudiating the negligence theory, and in extending the doctrine to cover the present case. *In re Phillips' Trusts*, [1903] 1 Ch. 183.

MORTGAGES — ASSUMPTION OF MORTGAGE BARRED BY STATUTE OF LIMITATIONS. — The equity of redemption of mortgaged property was owned by several persons as tenants in common. After the mortgage lien had become barred by the statute of limitations, one of the tenants in common conveyed his interest in the property to the others by a deed by which the grantees agreed to assume the mortgage. In proceedings for partition the mortgagee claimed to have the mortgage satisfied out of the proceeds of the partition sale. *Held*, that the plaintiffs are estopped to show that the mortgage was not an enforceable incumbrance at the time of their contract. *Christian* v. *John*, 76 S. W. Rep. 906 (Tenn.).

The doctrine of the principal case is firmly established. The principle commonly laid down is that the parties to a deed and their privies are estopped to deny the distinct and material statements of fact therein. Thus the express assumption of the mortgage by the grantee of an equity of redemption is conclusive evidence even for the benefit of third persons of the existence and validity of the mortgage. *Alvord* v. *Spring Valley Gold Co.*, 106 Cal. 547. It is believed that on principle the estoppel in these cases should be treated as resting on contract. When the grantee, by the deed, assumes a specific mortgage, he has contracted to pay a debt. Any question as to the grantor's liability under the mortgage becomes thereafter immaterial and cannot be raised by the grantee. See 15 HARV. L. REV. 801. But under the circumstances existing in the principal case it seems probable that the defendant assumed to discharge merely whatever liability, if any, the grantor might be under. Such being the contract, he should be allowed to set up the statute of limitations or any other defense that would have availed the grantor for the purpose of negativing such liability.

MORTGAGES — VALIDITY OF CHATTEL MORTGAGE OF UNSPECIFIED GOODS. — *Held*, that a recorded mortgage of a specified number of cattle out of a larger number of the same description is good against a *bona fide* purchaser from the mortgagor. *Sparks* v. *Deposit Bank of Paris*, 78 S. W. Rep. 171 (Ky.).

In most jurisdictions, chattel mortgages, to be effective against third persons, must so describe the property as to enable such persons upon reasonable inquiry to identify it. *Parker* v. *Chase and Buck*, 62 Vt. 206. Mere statement of number, where the mortgagor owns a larger number, has been almost uniformly held insufficient. *Stonebraker* v. *Ford*, 81 Mo. 532. The present decision goes upon the ground that the mortgage gives the mortgagee a right of selection and that the record gives sufficient notice to put third parties upon inquiry. As the true object of requiring record appears to be to provide a substitute for delivery, it would seem that there ought to be at least an unequivocal identification. See *Bullock* v. *Williams*, 16 Pick. (Mass.) 33. Moreover, the doctrine of right of selection has been almost universally repudiated. *Richardson* v. *Alpena Lumber Co.*, 40 Mich. 203. Unless the articles are of uniform quality so that a theory of tenancy in common may be invoked, or unless the part

mortgaged is in some way appropriated, it is difficult to see how the court can avoid the well-settled rule that title to unidentified property cannot pass. See *Chapman* v. *Shepard*, 39 Conn. 413.

PAR DELICTUM — RECOVERY OF MONEY PAID UNDER ILLEGAL CONTRACT. — The plaintiff entered into an illegal insurance contract with the defendant, acting upon representations made by the defendant's agent that such insurance was valid. The agent made the representations in good faith, being mistaken as to the law governing such policies. *Held*, that the plaintiff cannot recover the premiums paid by him upon the policy. *Harse* v. *Pearl Life Assurance Co.*, 20 T. L. R. 264 (Eng., C. A.).

This decision of the Court of Appeal reverses the decision of the King's Bench Division, which was discussed in 17 HARV. L. REV. 62.

POWERS — ILLUSORY APPOINTMENTS. — The donee of a non-exclusive power appointed a merely nominal amount to some of the beneficiaries. *Held*, that the doctrine of illusory appointments will not be adopted to invalidate the execution of the power. *Hawthorn* v. *Ulrich*, 69 N. E. Rep. 885 (Ill.).

The English courts of chancery held that an appointment by the donee of a special non-exclusive power which cuts off one of the beneficiaries from any substantial share in the fund, is invalid. This doctrine of illusory appointments was found very unsatisfactory, however, and was finally abolished by statute in 1830. See 11 GEO. IV. & 1 WM. IV. c. 46. In this country the question has seldom been adjudicated. There are a few old decisions, however, repudiating the former English doctrine. *Cowles* v. *Brown*, 4 Call (Va.) 477; *Graeff* v. *De Turk*, 44 Pa. St. 527. More modern *dicta*, on the other hand, have been tending to introduce the doctrine into this country. See *Thrasher* v. *Ballard*, 35 W. Va. 524, 529; *Degman* v. *Degman*, 98 Ky. 717, 722. The principal case, consequently, is of considerable interest as a strong decision in a court of last resort affirming the former American decisions and repudiating unequivocally the more recent *dicta* to the contrary.

PRESCRIPTION — ACQUISITION OF RIGHTS BETWEEN TENANTS OF SAME LANDLORD. — The defendant in an action of trespass claimed a right of way by prescription over the plaintiff's land. Both parties were tenants of the same landlord, and the defendant proved that he had used the way for more than forty years. *Held*, that the defendant has acquired no rights. *Kilgour* v. *Gaddes*, 116 L. T. 341 (Eng., C. A.). See NOTES, p. 487.

PROCESS — SERVICE UPON PERSON BROUGHT IN BY EXTRADITION PROCEEDINGS. — The defendant, a resident of Nebraska, having been brought into Iowa by extradition proceedings to answer to a criminal charge, gave bail for his appearance, and later returned for trial. After his acquittal, but before he had an opportunity to return home, he was served with civil process by the plaintiff. *Held*, that the defendant is privileged from such service. *Murray* v. *Wilcox*, 97 N. W. Rep. 1087 (Ia.).

Non-resident suitors, as well as non-resident witnesses, in attendance upon a trial in another state, are exempt from the service of civil process. *Matthews* v. *Tufts*, 87 N. Y. 568; *Fisk* v. *Westover*, 4 S. Dak. 233. Some courts refuse to extend this privilege to parties in criminal actions who have been brought into the state by extradition proceedings. *Williams* v. *Bacon*, 10 Wend. (N. Y.) 636; *Commonwealth* v. *Daniel*, 4 Clark (Pa.) 49. This class of cases does not seem to fall within the same rule of public policy that insures immunity to non-resident parties in civil actions, namely, that, in order to promote justice, suitors should be privileged to attend in other jurisdictions judicial proceedings in which they are concerned without incurring the risk of having other actions brought against them. The result reached in the principal case may, however, be supported on other grounds. In extradition proceedings jurisdiction over the individual is relinquished by one state and assumed by the other for the sole purpose of bringing about a prosecution for an alleged offense; to exercise the jurisdiction thus acquired for any other purpose would be a breach of faith on the part of the latter state. *Compton, Ault & Co.* v. *Wilder*, 40 Oh. St. 130.

PURCHASE FOR VALUE WITHOUT NOTICE — EXECUTION CREDITOR PURCHASING AT HIS OWN SALE. — The defendants attached certain land, and at the execution sale bought the land themselves. Prior to the attachment, the land had been conveyed to the plaintiff by an unrecorded deed. *Held*, that the defendant takes clear of the plaintiff's equity. *Sanger Bros.* v. *Collum*, 78 S. W. Rep. 401 (Tex., Civ. App.).

For a discussion of the question involved, see 17 HARV. L. REV. 63.

RAILROADS — RIGHT TO LIEN FOR DEMURRAGE. — The plaintiff allowed a car to remain unloaded for an unreasonable time after notification of its arrival. The

defendant claimed a lien on the goods for demurrage in accordance with its regulations. *Held*, that the lien exists. *Shumacher* v. *Chicago, etc., R. R. Co.*, 207 Ill. 199.

This decision affirms that in 108 Ill. App. 520, which was discussed in 17 HARV. L. REV. 284.

RECORDING AND REGISTRY LAWS — RECORD OF DEED OUTSIDE OF LINE OF TITLE. — *Held*, that a *bona fide* purchaser is bound to search the record for conveyances made by his grantor prior to the time when the grantor acquired legal title. *Bernardy* v. *Colonial, etc., Mortgage Co.*, 98 N. W. Rep. 166 (S. Dak.). See NOTES, p. 482.

RES JUDICATA — DEFENSE NOT RAISED IN FORMER SUIT. — The defendant filed a bill to cancel a mortgage on his land given to the plaintiff by the holder of the record title, on the ground that the plaintiff had notice that the defendant was the true owner. The suit ended in a judgment that the mortgage was valid. The plaintiff now files a bill to foreclose the mortgage, to which the defendant pleads as a partial defense that the loan secured was usurious. *Held*, that the validity of the plaintiff's lien is *res judicata* between the parties. *Belcher Land, etc., Co.* v. *Norris*, 78 S. W. Rep. 390 (Tex., Civ. App.).

The case comes within the rule that in a second suit involving the same cause of action, a plea of *res judicata* applies to every ground of recovery or defense which might have been presented and determined in the first suit. *Werlein* v. *New Orleans*, 177 U. S. 390. This is not strictly a doctrine of *res judicata*. The rule proceeds rather upon a policy which seeks to limit litigation, and is analogous to the rule that where several instalments have become due to the plaintiff, he must sue upon all of them in one action. *Beecher* v. *Conradt*, 13 N. Y. 108. The rule often works hardship, and in reality deprives a party of his cause of action. It might be urged, therefore, that on principle it should be confined to those cases where it would in fact lessen litigation. In the principal case the matter of the usury going only to the extent of the lien, it would seem that without increasing litigation it could be raised more properly under the bill to foreclose. However, the law is settled in accord with this decision. *Burnett* v. *Commonwealth*, 52 S. W. Rep. 965 (Ky.).

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST ACT. — A manufacturer of goods made a contract of sale with jobbers in another state into which the goods were to be shipped. The jobbers agreed that the goods thus purchased should not be sold or shipped outside the state in which they did business. *Held*, that this agreement is not in restraint of trade within the meaning of the Sherman Anti-Trust Act. *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. Rep. 593 (C. C. A., Eighth Circ.). See NOTES, p. 480.

SLANDER — INSANITY AS DEFENSE. — The defendant spoke words publicly charging the plaintiff with unchastity. The defense was that the words were uttered under an insane delusion that they were true. *Held*, that such insanity is a complete defense. *Irvine* v. *Gibson*, 77 S. W. Rep. 1106 (Ky.). See NOTES, p. 489.

SPECIFIC PERFORMANCE — CONCEALMENT BY VENDEE. — A corporation which was about to locate in a certain town employed a person living there to secure an option on the defendant's land. He did so without revealing to the defendant the facts within his knowledge, and then assigned the option to the corporation. *Held*, that the defendant cannot resist specific performance on the ground that he has been defrauded. *Standard Steel Car Co.* v. *Stamm*, 56 Atl. Rep. 954 (Pa.).

In general, when both vendor and vendee are in the business, dealing at arm's length, the vendee need not disclose his special information. Thus, specific performance was granted where the vendee knew of the vendor's ignorance of a rise in the value of the land, and where a debtor bargaining for a compromise knew that the creditor was unaware that a preliminary judgment in the suit had gone for him. *Dolman* v. *Nokes*, 22 Beav. 402; *Turner* v. *Green*, [1895] 2 Ch. 205. But whenever the vendor is not in the business, and special knowledge of a material fact has given the vendee an undue advantage, specific performance will be refused. Thus, where an expert buyer conceals from the seller, an ignorant farmer, the mineral value of his land, specific performance will not be granted. *Woollums* v. *Horsley*, 93 Ky. 582; *cf. Margraf* v. *Muir*, 57 N. Y. 155. But clearly, concealment by the vendee ought not to defeat specific performance, when, as in the principal case, the increase in the value of the land has been caused altogether by the vendee's pursuit of his own business.